

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
ALBERT GOMEZ, M.D.,  
Debtor.

Case No. 92-58631-MM  
Chapter 7

PHYLLIS M. WAITKEVICH,  
Plaintiff,

Adversary No. 93-5109  
Adversary No. 93-5165

vs.

ALBERT M. GOMEZ, M.D.,  
Defendant.

**MEMORANDUM DECISION AND  
ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

Before the Court for consideration is the plaintiff's motion for summary judgment declaring non-dischargeable the debtor's obligation to her arising from a default judgment in Superior Court for personal injuries resulting from the debtor's medical malpractice. As set forth herein, the plaintiff's motion for summary judgment is granted on the basis that the debtor does not qualify for discharge under § 727(a)(8), having received a discharge in a prior proceeding filed in 1990.

**FACTS**

The material facts do not appear to be in dispute. Albert Gomez, M.D., has filed a total of

1 three bankruptcy petitions since 1986. He filed his first chapter 7 bankruptcy petition on December  
2 2, 1986 and received a discharge on September 19, 1988.

3 Dr. Gomez filed a second petition under chapter 11 on September 6, 1990, Case No. 590-  
4 04247-JRG. While the second bankruptcy case was pending, the plaintiff, Phyllis Waitkevich,  
5 commenced a lawsuit against Dr. Gomez in the Santa Clara County Superior Court on September 17,  
6 1990 based on a claim for medical malpractice.

7 At a hearing held December 19, 1991 on the Court's Order to Show Cause, the Bankruptcy  
8 Court, the Honorable James R. Grube presiding, converted the second bankruptcy case to a chapter 7  
9 case based on the debtor's failure to file monthly operating reports during the proceeding and  
10 otherwise to prosecute the case diligently. A party in interest at that hearing raised the question  
11 whether Dr. Gomez was entitled to a discharge in the second bankruptcy case or whether he was  
12 precluded from a discharge based on the discharge granted September 19, 1988 in the first case. The  
13 Bankruptcy Court stated at the time that although the debtor may not be entitled to another discharge  
14 pursuant to § 727(a)(8), the chapter 11 case should not be allowed to continue, a chapter 7 trustee  
15 could review the assets of the estate to determine whether a chapter 7 would benefit creditors or  
16 whether to move that the case be dismissed, and the chapter 7 trustee and other interested creditors  
17 may verify the prior discharge and, if appropriate, raise the issue whether the debtor is entitled to a  
18 discharge.

19 The plaintiff, Phyllis Waitkevich, commenced an adversary proceeding on February 21, 1991,  
20 Adversary No. 92-5109, by a complaint under 11 U.S.C. § 727(a)(8) to deny the debtor's discharge.  
21 A status conference in the adversary proceeding was held in May 1992, at which counsel for the  
22 debtor indicated that if non-dischargeability under § 727(a)(8) is not automatic, he would stipulate as  
23 to the plaintiff's claim. Judge Grube indicated that he would investigate to determine whether the  
24 clerk's office would automatically make a determination of dischargeability as to other claims under §  
25 727(a)(8).

26 Dr. Gomez and Ms. Waitkevich subsequently entered into a written stipulation on July 9,  
27 1992 which provided that only the plaintiff's claim shall not be discharged and that the plaintiff would  
28 be entitled to pursue her claim to judgment and execution in the Superior Court. Waitkevich had

1 acquired a default judgment for \$250,000 against Dr. Gomez in the Superior Court on May 29, 1992.  
2 The Bankruptcy Court approved the parties' stipulation by order signed on July 13, 1992. A  
3 discharge was entered in the second bankruptcy case on March 5, 1993, and the discharge was never  
4 revoked.

5 The debtor commenced this chapter 11 case on December 14, 1992. Once again, the case  
6 was converted to a chapter 7 case on March 1, 1993, and a discharge was entered on September 27,  
7 1993. Waitkevich filed these adversary proceedings seeking a determination that the plaintiff's claim  
8 based on the malpractice judgment is non-dischargeable pursuant to § 727(a)(8).

## DISCUSSION

### a. Standard for Summary Judgment

11 Under F.R.C.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to  
12 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
13 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of  
14 law." Only genuine disputes over material facts that might determine the outcome of the suit under  
15 the applicable law will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477  
16 U.S. 242, 106 S.Ct. 2505, 2510 (1986). A dispute over material facts is "genuine" if the evidence is  
17 such that a fact finder could reasonably find in favor of the non-moving party. Id. The non-moving  
18 party must therefore counter the motion with specific facts showing that there is a genuine issue for  
19 trial. Id.

20 The Court must also consider the applicable standard of proof and which party bears the  
21 burden of proof. Id. at 2512. Summary judgment is proper if a party fails to make a sufficient  
22 showing of an element essential to that party's case, and on which that party bears the burden of  
23 proof. Celotex Corp. v. Catrett, 477 U.S. 316, 106 S.Ct. 2548, 2552 (1986). In a proceeding to  
24 deny the debtor's discharge, the objecting party bears the initial burden of proof. See In re Cox, 41  
25 F.3d 1294, 1296 (9th Cir. 1994). The evidence is to be viewed in the light most favorable to the non-  
26 moving party, and all justifiable inferences are to be drawn in his favor. Anderson, 106 S.Ct. at 2513.

27 The debtor argues that a triable issue exists as to whether a prior stipulation for voluntary  
28 dismissal of the adversary proceeding is enforceable by the debtor. However, the issue does not

1 appear to be a genuine issue as to a material fact because a fact determination would not affect the  
2 outcome of the proceeding. The Bankruptcy Court never approved the purported stipulation or the  
3 dismissal of this proceeding. Because the purported stipulation for dismissal was never filed or  
4 approved by the Court, it is not enforceable by the debtor. Fed. R. Civ. P. 41(a); In re Rothwell, 159  
5 B.R. 374, 379 (Bankr. D. Mass. 1993)(under B.R. 9019, settlement must be approved by the  
6 bankruptcy court to be enforceable).

7  
8 **b. Section 727(a)(8) Precludes Another Discharge**

9 Waitkevich argues that under § 727(a)(8) the debtor is precluded from obtaining the benefits  
10 of another discharge in this case because he was granted a discharge in March 1993 in his second  
11 bankruptcy case. The debtor responds that because he was not entitled to a discharge in the second  
12 case because it was filed within six years of the first case, the discharge in the second case was  
13 erroneously entered by the Bankruptcy Court and is effectively nugatory such that the debts  
14 scheduled in the second filing were not actually discharged. He also argues that he did not waive his  
15 discharge by the stipulation with the plaintiff but merely acknowledged that he did not qualify for a  
16 discharge in the second case and that he does not have a mechanism to revoke his own discharge after  
17 it was erroneously entered.

18 11 U.S.C. § 727(a)(8) provides in pertinent part:

19 (a) The Court shall grant the debtor a discharge, unless

20 (8) the debtor has been granted a discharge under this section, under  
21 section 1141 of this title, or under section 14, 371, or 476 of the  
22 Bankruptcy Act [former 11 U.S.C. §§ 32, 771, 876], in a case  
commenced within six years before the date of the filing of the petition.

23 Section 727(a)(8) serves to bar discharge where a debtor has been granted a discharge within the  
24 statutory period. Mendoza, 16 B.R. at 994. Bankruptcy Rule 4004(a) provides that a complaint  
25 objecting to the debtor's discharge under § 727(a) shall be filed no later than sixty days following the  
26 first date set for the meeting of creditors. The purpose of the section is to prevent an overly frequent  
27 use of liquidation as a means of avoiding debt. 4 Collier on Bankruptcy ¶ 727.11[1]; Canganelli, 132  
28 B.R. at 378-79; In re Mendoza, 16 B.R. 990, 993 (Bankr. S.D. Cal. 1982). The six year time period

1 of § 727(a)(8) begins to run from the date the first case is commenced, and ends on the date the  
2 subsequent case is filed. 4 Collier on Bankruptcy ¶ 727.11[2] (15th ed. 1995); In re Canganelli, 132  
3 B.R. 369, 378 (Bankr. N.D. Ind. 1991).

4 However, the debtor's argument that the discharge has no effect is misplaced. Discharge is  
5 effective immediately upon expiration of the sixty-day period following the creditor's meeting so long  
6 as no objections are filed. In re Dietz, 914 F.2 161, 164 (9th Cir. 1990)(citing Bankr. Rule 4004(c);  
7 B. Weintraub and A. Resnick, *Bankruptcy Law Manual*, ¶ 3.04[1] at 3-19 (rev. ed. 1986) (noting  
8 that in the absence of timely objections discharge is "automatic" and "a matter of course")). A debtor  
9 may be entitled to a general discharge notwithstanding that the debtor's chapter 7 case was  
10 commenced within six years after the debtor was granted a discharge in a prior chapter 7 case if no  
11 timely objection to the debtor's discharge is filed. In re Canganelli, 132 B.R. 369, 385 (Bankr. N.D.  
12 Ind. 1991)(construing discharge under § 727(a)(8)). As a practical matter, creditors in the debtor's  
13 second case were notified of the discharge and have likely closed their collection files. At the time of  
14 argument on the plaintiff's motion, the debtor argued that Judge Grube had specifically ordered that  
15 the debtor's other liabilities would not be discharged. However, given the opportunity to file post-  
16 argument briefs, the debtor was unable to cite to any portions of the Court's record to support that  
17 argument. The debtor received and enjoyed the benefits of a second discharge. Although he now  
18 argues that the debtor does not have standing to move for a revocation of discharge, it is unlikely that  
19 the debtor had any inclination to bring the second discharge to the attention of the Court prior to this  
20 proceeding.

21 Having concluded that is § 727(a)(8) is dispositive, the Court need not reach the other  
22 arguments that the plaintiff has raised in her motion based on § 523(a)(10) and the doctrine of judicial  
23 estoppel.

## 24 CONCLUSION

25 For the reasons set forth, the plaintiff's motion for summary judgment is granted under §  
26 727(a)(8), judgment shall be entered for the plaintiff, and the debtor's discharge entered on March 1,  
27 1993, shall be revoked. Counsel for the plaintiff shall submit both a form of judgment in the  
28

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**For The Northern District Of California**

adversary proceedings and a form of order revoking the debtor's discharge in the main bankruptcy case.

Good cause appearing, it is **SO ORDERED**.